IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. REGINALD C. MALONE

Appeal from the Circuit Court for Rutherford County
No. F-59386 Robert E. Corlew, III, Judge

No. M2008-02880-CCA-R3-CD - Filed November 4, 2008

The Defendant, Reginald C. Malone, was convicted of one count of the sale of .5 grams or more of cocaine, a Class B felony. The trial court sentenced him as a Range I, standard offender to eight years in the Department of Correction. Because the trial court found that the Defendant was on probation at the time the crime occurred, this eight-year sentence was ordered to be served consecutively to the Defendant's sentence on a prior conviction. In this direct appeal, the Defendant argues that: (1) evidence of prior charges against him was admitted at trial, in violation of Tennessee Rule of Evidence 404(b); (2) the prosecution engaged in misconduct during closing argument; (3) the evidence at trial was insufficient to convict him; and (4) his sentence should be concurrent rather than consecutive because he was not on probation at the time of the offense. Following our review of the record and the parties' briefs, we conclude that the Defendant's first two issues are waived due to an untimely motion for a new trial. We also hold that the Defendant's insufficient evidence argument lacks merit and that the record fails to support the trial court's finding that the Defendant was on probation at the time he committed the offense at issue. We therefore order that the judgment be modified to reflect that the Defendant's sentence be served concurrently with the previous sentence. Finally, the Defendant seeks coram nobis relief on the basis of newly discovered evidence, citing to discrepancies about the weight of cocaine he sold. We affirm the trial court's denial of relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

John G. Mitchell, III, Murfreesboro, Tennessee, for the appellant, Reginald C. Malone.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant District Attorney General; William Whitesell, District Attorney General; and Thomas Parkerson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On February 13, 2006, at about 3:00 p.m., Detective Merrill Beene of the Murfreesboro Police Department met confidential informant (CI) Anthony Jones outside a Sleep Inn in Murfreesboro. Detective Beene planned to use Jones as the purchaser in a "controlled buy," in which a CI attempts to purchase drugs from a suspected dealer, reporting the results back to police. Detective Beene searched Jones' person, as well as his car, a white 1990 Nissan Maxima. Detective Beene found no contraband. He then issued $900 in previously photocopied bills to Jones and equipped Jones with a recording microphone.

At Det. Beene's request, Jones called the Defendant and asked to buy an ounce of crack cocaine for $900. Jones asked the Defendant to meet him at a nearby Shell station, at the intersection of Chaffin Place and Old Fort Parkway. The Defendant agreed. Jones drove his car to the Shell station and waited for the Defendant.

Meanwhile, Lieutenant Nathan McDaniel of the Murfreesboro Police Department set up video surveillance from a concealed position near the Shell station. He recorded video of the subsequent transaction onto DVD, which the State played at trial. He also monitored the audio output from Jones' recording microphone. The resulting tape recording was also played at trial.

The camera recorded the Defendant pulling into the Shell station in a brown Mercury sedan. Lieutenant McDaniel, using the car's license plate number as retrieved from the surveillance video, later confirmed that the car was registered to the Defendant. The Defendant exited his car and, after briefly entering the Shell station, got into Jones' car. Jones testified that the Defendant then sat down, removing a bag of white rock substance and a set of digital scales from his coat. The Defendant placed the scales on the center console and weighed the bag. Finding it to be of acceptable weight, Jones gave his $900 to the Defendant and took the bag. After counting the money,[1] the Defendant exited the car. Video showed the Defendant returning to his vehicle and driving away.[2]

Jones returned to the Sleep Inn to meet Det. Beene. Detective Beene received the rock substance from Jones and sealed it into an evidence bag, recording the case number, the date, and

[1] Much of the transaction did not come through clearly on the audio tape, but Lieutenant McDaniel was able to testify that a sound he heard on the tape was consistent with money being counted.

[2] Police arrested the Defendant at a later date.

his initials. He also paid Jones somewhere between $125 and $150 for his assistance. Detective Beene later sent this evidence bag to the Tennessee Bureau of Investigation (TBI) for analysis.

TBI Agent Donna Flowers, a forensic chemist, examined the contents of the evidence bag. She testified at trial that it contained 22.5 grams of cocaine base. The Defendant did not testify at trial or offer any proof.

Following arguments and deliberations, the jury found the Defendant guilty of the sale of .5 grams or more of cocaine. At his subsequent sentencing hearing, the trial court sentenced the Defendant to eight years in the Tennessee Department of Correction, to be served consecutively to an earlier sentence for a different offense. He now appeals.

Analysis

I. Untimely Motion for New Trial

The State correctly notes that the Defendant failed to timely file his motion for a new trial. Tennessee Rule of Criminal Procedure 33(b) states that:

> A motion for a new trial shall be made in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered. The Court shall upon motion allow amendments liberally until the day of the hearing of a motion for a new trial.

Tenn. R. Crim. P. 33(b). A trial court does not have jurisdiction to rule on a motion filed outside the thirty-day period. State v. Bough, 152 S.W.3d 453, 460 (Tenn. 2004). A trial judge's erroneous consideration of an untimely motion "does not validate the motion, and an appellate court will not consider the issues raised in the motion unless the issue or issues would result in the dismissal of the prosecution against the accused." State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989) (citing State v. Davis, 748 S.W.2d 206 (Tenn. Crim. App. 1987)) (other citations omitted). Consequently, "[i]f a motion for new trial is not timely filed, all issues are deemed waived except for sufficiency of evidence and sentencing." Id. (citing State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997)); see also Tenn. R. App. P. 3(e). We also note that a trial court does not have the authority to enlarge the time for filing a motion for a new trial. Davis, 748 S.W.2d at 207.

This Court also lacks the authority to waive the untimely filing of a motion for a new trial. State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980); see also Tenn. R. App. P. 4(a). Furthermore, Tennessee Rule of Appellate Procedure 3(e) provides that this Court will treat as waived any issue raised on appeal through which a defendant seeks a new trial, if that issue was not raised in a timely motion for a new trial. See Tenn. R. App. P. 3(e). The rule states, in relevant part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring

> during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e).

In this case, the Defendant's judgment was stamp-filed on April 23, 2007. He had thirty days thereafter to file a motion for a new trial. His motion was filed on June 5, 2007, however, and is therefore untimely. See Tenn. R. Crim. P. 33(b).

Because the Defendant requests a new trial as relief for the evidentiary error and prosecutorial misconduct he claims took place below, his untimely filing of a motion for new trial results in waiver of those issues. See Tenn. R. App. P. 3(e).

II. Sufficiency of the Evidence

Next, the Defendant argues that the evidence is insufficient to support his conviction beyond a reasonable doubt. This argument is properly before this Court, because dismissal, not a new trial, is the remedy in the event of insufficient evidence. See Tenn. R. App. P. 13(e).

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-17-408(b)(4) classifies cocaine as a controlled substance. Section 39-17-417(a)(3) provides that it is an offense for a defendant to knowingly sell a controlled substance. Section 39-17-417(c)(1), the punishment provision, provides that sale of "[c]ocaine . . . is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine."

In this case, Det. Merrill Beene witnessed CI Anthony Jones arrange a drug buy with the Defendant over the telephone. Detective Beene thoroughly searched Jones' person and vehicle to make sure he had no drugs in his possession. Video surveillance showed the Defendant arriving at the appointed site and entering Jones' car. Jones testified that, while in his car, the Defendant produced what was later determined by a TBI forensic chemist to be 22.5 grams of cocaine base. He gave it to Jones in exchange for money. Audio surveillance, though not of high enough quality to fully corroborate this testimony, tended to support it. We conclude that this evidence is sufficient to support the Defendant's conviction for the sale of .5 grams or more of cocaine beyond a reasonable doubt.

III. Concurrent Sentencing

The Defendant's sentencing claim is also properly before this Court despite the Defendant's untimely motion for a new trial, because a new trial is not the remedy for a sentencing error. See Tenn. Code Ann. 40-35-401(c).

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Tennessee Code Annotated section 40-35-115 governs whether multiple sentences will run concurrently or consecutively. It provides in part that the court may order sentences to run consecutively if the court finds by a preponderance of the evidence that the defendant is sentenced for an offense committed while on probation. Tenn. Code Ann. § 40-35-115(b)(6). In this case, the trial judge found that the Defendant had been on probation at the time he committed the February 13, 2006 offense. Solely on that basis, he ruled that the Defendant's sentences would run consecutively:

> [The Court]: Inasmuch as Mr. Malone was on probation at the time this offense was committed, it appears that we must under the law then require that his sentence be consecutive to the prior sentences that have previously been imposed upon Mr. Malone.

This ruling appears to have resulted in large part from the following exchange at sentencing:

> [State]: How well do you do on probation, Mr. Malone?
> [Defendant]: How well do I do?
> [State]: Yeah. Have you ever violated probation before?
> [Defendant]: Of course. With these charges.
> [State]: Of course you have. How many times have you violated your probation?
> [Defendant]: Once with this charge.
> [State]: Well, how many other times.
> [Defendant]: What [sic] you mean how many other times? Once with this charge.
> . . . .
> [State]: March 23, 2006, is that the violation for picking up this new charge?
> [Defendant]: That's the actual charge that I'm on probation for.
> [State]: Yeah. And so you were on probation when you committed this offense for which you have been convicted, is that correct?
> [Defendant]: That's correct.
> [State]: And what about back in 2000, the charge of domestic assault, did you have a violation of probation on that?
> [Defendant]: 2000?
> [State]: Yes.
> [Defendant]: Did I have a violation in 2000?
> [State]: Yes.
> [Defendant]: I got on probation in 2000.
> [State]: Yes, sir, you were placed on probation for the offense of domestic assault—no, that's not the conviction date. The

conviction date will be August 10th of 2000. You were placed on probation for domestic assault.

[Defendant]: Are you asking me?

[State]: Yes, sir.

[Defendant]: Let me ask you.

[State]: Okay.

[Defendant]: Are you asking me did I violate in 2000 on that what I was place on probation for? Is that what you're asking?

[State]: No. I'm asking you were you placed on probation on August 10th of 2000, for domestic assault.

[Defendant]: Yes.

[State]: Okay. And did you have a violation of probation on that charge?

[Defendant]: Yeah, I did.

Although the preceding exchange is somewhat confusing, the Defendant's criminal record does reflect that the Defendant had received probation on two occasions. On August 10, 2000, he was placed on probation for eleven months and twenty-nine days for domestic assault. It appears from the Defendant's record that he violated this probation when he was convicted, on January 23, 2002, of an aggravated assault committed on March 23, 2001.

This is the only probation the Defendant received before committing the present crime, however. The Defendant did not receive his second probationary sentence until March 30, 2006, for an assault committed on March 23, 2006. No other probationary period appears on the Defendant's criminal record. The Defendant's actions on February 13, 2006, occurred more than six weeks before he received this second probation, and as such his conduct, on February 13, 2006, could not have violated it.

The State notes that the Defendant testified at sentencing that he had, in fact, been on probation on February 13, 2006, and that he had violated that probation. The State argues that this admission alone, mistaken though it may have been, is sufficient to meet the preponderance of the evidence standard required of the trial judge. We disagree. We conclude that the Defendant's admission under cross-examination does not preponderate over the contradictory proof contained in the record from the sentencing hearing.

It appears that the trial judge, apparently due to the misleading exchange between the State and the Defendant, as well as defense counsel's failure to rebut the suggestion that the Defendant was on probation on February 13, 2006, failed to notice that the Defendant had not been placed on probation until March 30, 2006. Had he noticed, the sole reason for his order that the Defendant's sentences be served consecutively would have been removed. Regardless, the evidence contained in the record on appeal is insufficient to support a finding that the offense in this case was committed while the Defendant was on probation.

IV. Error Coram Nobis

After the judgments of conviction were entered in this case, the Defendant, pro se, filed a petition for error coram nobis. See Tenn. Code Ann. § 40-26-105.

The Defendant alleged that the proof showed that the CI testified that the Defendant sold the CI 27.6 grams of cocaine, but the proof from the TBI laboratory showed that only 22.5 grams of cocaine was presented to the laboratory for testing. The Defendant alleged that this information was "newly discovered evidence" which demonstrated a very serious "chain of custody" issue.

The trial court found that the information set forth in the petition did not constitute "newly discovered evidence" and denied the writ. The Defendant appealed from the order of denial. This Court ordered the appeal from the order denying the error coram nobis petition to be consolidated with the direct appeal.

The facts alleged in the petition were a part of the evidence introduced at trial. The fact that the weight of the cocaine as shown by the Defendant's scales was not identical to the weight of the cocaine as shown by the TBI crime laboratory's scales was established by the proof introduced at trial. This information is not "newly discovered evidence." See id. Furthermore, no objection was made at trial based upon insufficient proof of the chain of custody. We conclude that the trial court did not err by denying the writ of error coram nobis.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's conviction. We remand the case to the Circuit Court of Rutherford County for modification of the judgment to reflect that the eight-year sentence be served concurrently with the Defendant's prior sentence.

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DAVID H. WELLES, JUDGE